

Dato' Ting Check Sii v Galaxy Grip Sdn Bhd & Ors

A

HIGH COURT (KUCHING) — SUIT NO 22-111 OF 2005-III(I)
RHODZARIAH BUJANG JC
16 JULY 2010

B

Civil Procedure — Judgment and orders — Unless orders — Whether terms of order satisfied requirements — Whether penalty prescribed by order should be imposed — Whether there was justifiable excuse for non-compliance with order — Whether non-compliance with order could be cured by O 1A of the Rules of the High Court 1980 — Whether plaintiff's application to extend time for compliance should be allowed

C

D

The plaintiff sought an adjournment of the part-heard trial fixed on 19 and 20 May 2010 on the grounds that his counsel was standing as a candidate in the Sibü by-election scheduled on 16 May 2010 and that his handwriting expert would be unable to attend the court hearing on the dates in question. The trial judge agreed to the adjournment but made an unless order under stipulating that the handwriting expert's report ('the expert report') had to be filed and served within three weeks from 19 May 2010 ie by 9 June 2010, failing which the plaintiff's case would be dismissed. When the expert report was not served within the stipulated time the defendants applied by way of the instant summons in chambers application to strike out the plaintiff's claim. The plaintiff then filed his application for an extension of time to comply with the unless order. The plaintiff submitted that his expert witness was unable to complete his report within the stipulated time because he had suffered a fall and torn the ligaments of his right knee, and hence the delay in complying with the unless order. The expert's medical leave certificate and referral letter from Pantai Hospital Kuala Lumpur were exhibited in the affidavit filed in opposition to the defendant's application for striking out. The defendants argued that the unfortunate accident of the expert was not a good justification for the non-compliance of the unless order because the plaintiff had been given more than ample time to deliver the report.

E

F

G

H

Held, dismissing the plaintiff's application with costs:

- (1) An unless order is a peremptory order of the court. As the terms of the unless order in this case were clearly spelt out, its breach would automatically attract the penalty prescribed in the order when the plaintiff failed to comply with it. However, the reason for the breach by the plaintiff must be examined before imposing the penalty prescribed in the order (see paras 4-5).

I

- A (2) The unless order was made by the trial judge as he found that he had given much latitude to the plaintiff to prepare his supplementary expert report and more importantly because the original documents sought to be examined by the plaintiff's expert formed the bedrock of the plaintiff's action in this case. However, based on the history of the proceedings, the
- B expert's unfortunate accident was not a justifiable excuse for the non-compliance of the unless order because that report should have been prepared two weeks before 2 April 2010 bearing in mind that the examination of the documents in court was on 15 January 2010. Further, given the time lapse between the examination of the original documents
- C to the date of the expert's accident, the preparation of the expert's supplementary report could have been done in the comfort of the expert's home during his recuperation. As such, the breach of the unless order by the plaintiff could have been avoided (see paras 10 & 12).
- D (3) The plaintiff's reliance on O 1A of the Rules of the High Court 1980 ('RHC') is without basis because the unless order was not made pursuant to the RHC and the non-compliance was not of any technical requirements of any of the provisions of the said Rules (see para 14).
- E (4) The plaintiff's application for an extension of time to file the expert's report was filed on the date of the hearing of the defendant's application for striking out the plaintiff's claim. The unexplained and inexcusable delay in applying for an extension of time to file the expert's report was a factor to be considered in determining whether to allow the plaintiff's application as it showed how genuine the plaintiff was when he made the
- F said application. Further, late applications without good and just cause, which cause further delay in proceedings, are frowned upon by the courts (see para 15).

[Bahasa Malaysia summary]

- G Plaintiff memohon penangguhan terhadap perbicaraan separuh dengar yang ditetapkan pada 19 dan 20 Mei 2010 atas alasan bahawa peguamnya bertanding sebagai calon pilihan raya kecil Sibu yang dijadualkan pada 16 Mei 2010 dan bahawa pakar tulisan tangannya tidak dapat menghadiri perbicaraan mahkamah pada tarikh-tarikh yang dipersoalkan. Hakim perbicaraan
- H bersetuju untuk penangguhan tersebut tetapi membuat perintah terlebih dahulu (*unless order*) di bawah syarat bahawa laporan pakar tulisan tangan ('laporan pakar') mestilah difailkan dan diserahkan dalam masa tiga minggu dari 19 Mei 2010 iaitu pada 9 Jun 2010, jika gagal kes plaintif akan ditolak. Apabila laporan pakar tidak diserahkan dalam masa yang ditetapkan
- I defendan-defendan memohon melalui permohonan saman dalam kamar ini untuk membatalkan tuntutan plaintif. Plaintif kemudiannya memfailkan permohonannya untuk lanjutan masa bagi mematuhi perintah terlebih dahulu tersebut. Plaintif menghujah bahawa saksi pakarnya tidak dapat menyelesaikan laporannya dalam masa yang ditetapkan kerana dia terjatuh dan ligamen kaki

kanannya terkoyak, maka lambat dalam mematuhi perintah terlebih dahulu tersebut. Sijil cuti sakit pakar dan surat rujukan daripada Hospital Pantai Kuala Lumpur dilampirkan di dalam affidavit yang difailkan menentang permohonan defendan untuk pembatalan. Defendan-defendan berhujah bahawa kemalangan pakar tersebut bukan justifikasi yang wajar untuk ketidakpatuhan terhadap perintah terlebih dahulu kerana plaintif telah diberi lebih daripada cukup masa untuk menyerahkan laporan tersebut.

A

B

Diputuskan, menolak permohonan plaintif dengan kos:

- (1) Perintah terlebih dahulu adalah perintah mahkamah yang mesti dipatuhi. Memandangkan terma-terma perintah terlebih dahulu di dalam kes ini jelas dinyatakan, kemungkinannya akan secara automatik membangkitkan penalti yang ditetapkan di dalam perintah apabila plaintif gagal untuk mematuhi. Walau bagaimanapun, alasan untuk kemungkiran oleh plaintif mesti diteliti sebelum mengenakan penalti yang ditetapkan di dalam perintah tersebut (lihat perenggan 4–5).
- (2) Perintah terlebih dahulu dibuat oleh hakim bicara kerana beliau mendapati bahawa beliau telah memberi banyak kebebasan kepada plaintif untuk menyediakan laporan pakar tambahannya dan lebih penting lagi kerana dokumen-dokumen asal yang dipohon untuk diteliti oleh pakar plaintif adalah perkara-perkara asas tindakan plaintif dalam kes ini. Walau bagaimanapun, berdasarkan sejarah prosiding-prosiding, kemalangan pakar tersebut bukan alasan berjustifikasi untuk ketidakpatuhan perintah terlebih dahulu kerana laporan tersebut sepatutnya disediakan dua minggu sebelum 2 April 2010 mengambilkira bahawa penelitian dokumen-dokumen di mahkamah adalah pada 15 Januari 2010. Selanjutnya, mengambilkira selang masa di antara dokumen-dokumen asal berbanding tarikh kemalangan pakar, penyediaan laporan tambahan pakar boleh dibuat dalam keselesaan rumah pakar semasa pemulihannya. Oleh itu, kemungkiran perintah terlebih dahulu oleh plaintif boleh dielakkan (lihat perenggan 10 & 12).
- (3) Sandaran plaintif ke atas A 1A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') tidak berasas kerana perintah terlebih dahulu tidak dibuat berikutan KMT dan ketidakpatuhan bukan terhadap mana-mana keperluan teknikal mana-mana peruntukan Kaedah tersebut (lihat perenggan 14).
- (4) Permohonan plaintif untuk lanjutan masa untuk memfailkan laporan pakar difailkan pada tarikh pendengaran permohonan defendan untuk pembatalan tuntutan plaintif. Kelewatan yang tidak dijelaskan dan tidak dapat dimaafkan dalam memohon untuk lanjutan masa bagi memfailkan laporan pakar adalah faktor untuk dipertimbangkan dalam menentukan sama ada untuk membenarkan permohonan kerana ia menunjukkan bahawa plaintif jujur apabila dia membuat permohonan tersebut.

C

D

E

F

G

H

I

- A Selanjutnya, permohonan lewat tanpa alasan yang bagus, yang menyebabkan kelewatan lanjut prosiding-prosiding, tidak disukai oleh mahkamah-mahkamah (lihat perenggan 15).]

Notes

- B For cases on unless orders, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4746–4753.

Cases referred to

- C *Folin & Brothers Sdn Bhd v Wong Foh Ling Ors (No 2)* [2001] 5 CLJ 476, HC (refd)
Government of Malaysia v Dato' Chong Kok Lim [1973] 2 MLJ 74, HC (refd)
Hytec Information Systems Ltd v Coventry City Council [1997] 1 WLR 1666, CA (refd)
- D *Jokai Tea Holdings Ltd, In re* [1992] 1 WLR 1196, CA (refd)
Md Amin bin Md Yusof & Anor v Cityvilla Sdn Bhd [2004] 4 MLJ 446; [2004] 3 CLJ 88, CA (refd)
Reiss v Woolf [1952] 2 All ER 112, CA (refd)
Thiruchelvasegaram all Manickavasegar v Mahadevi a/p Nadchatiram [1998] 4 MLJ 297, CA (refd)
- E

Legislation referred to

Rules of the High Court 1980 O 1A, O 3 r 5

- F *Wong Ho Leng (Suhana Razali with him) (Wong Ho Leng & Co) for the plaintiff. Sim Hui Chuang (Lim Lip Sze and Wilian Yeo with him) (JM Lim & Co) for the defendants.*

Rhodzariah Bujang JC:

- G RULING (ENCLS 192 AND 195)

- H [1] This ruling is necessitated by an unless order which I made on 19 May 2010 with regards to the further conduct of the trial of the action which was part-heard before me. The unless order I felt compelled to make because the plaintiff's handwriting expert's supplementary report was slow in coming and by a letter dated 7 May 2010 (encl 184) the plaintiff's counsel, Mr Wong Ho Leng wrote in for an adjournment of the trial fixed on 19 and 20 May 2010 for two reasons:
- I
- (a) Mr Wong Ho Leong was standing as a candidate in the Sibu by-election scheduled on 16 May 2010 (polling day).
 - (b) The plaintiff's handwriting expert was unable to attend on the said two dates.

[2] Although I agreed to adjourn the hearing, not so much on the first ground but more on the second ground, I decided that I have to take a tough stand on the preparation of the handwriting expert report. So, I made the unless order which was that the said report must be filed and served within three weeks from 19 May 2010 (ie by 9 June 2010) failing which the plaintiff's case will be dismissed.

[3] The report was not served within that time period. Thus, by a summons in chambers dated 23 June 2010 the defendants have applied to strike out the plaintiff's claim. The plaintiff has also put in a summons in chambers dated 5 July 2010 for extension of time to file their said report or in the alternative the plaintiff's second supplementary report dated 27 May 2010 which was already filed in court on 23 June 2010 and served on the defendants' counsel on 28 June 2010 be accepted and used in this action.

THE LEGAL EFFECT OF AN UNLESS ORDER

[4] An unless order, being a peremptory order of the court, must be complied with and its breach should automatically attract the penalty prescribed in the order but of course, before that happens the court must first ensure that the terms of the order was clearly spelt out and there was a complete failure of complying with it. This much was held by the English Court of Appeal in *Reiss v Woolf* [1952] 2 All ER 112.

[5] I am pretty sure myself that the terms of the unless order which I made in this case had satisfied the requirements set above. However, I had to reconsider the strict enforcement of an unless order stipulated above against the latter decisions of the English courts which have been considered and applied in the Court of Appeal's case of *Md Amin bin Md Yusof & Anor v Cityvilla Sdn Bhd* [2004] 4 MLJ 446; [2004] 3 CLJ 88 and in the High Court's case of *Folin & Brothers Sdn Bhd v Wong Foh Ling Ors (No 2)* [2001] 5 CLJ 476. These later cases held that the court must be satisfied before imposing the penalty prescribed in the unless order that the breach of it was not intentional and contumelious. YA Datuk Abdul Malik Ishak J (as His Lordship then was) in *Folin's* case had quoted excerpts from the judgment of Ward LJ in *Hytex Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666 (at p 1674) and Sir Nicholas Browne-Wilkinson VC in *In re Jokai Tea Holdings Ltd* [1992] 1 WLR 1196 (at p 1203) where this principle was stated.

[6] Although both quotations are relevant to this judgment, I would like to reproduce that of Sir Nicholas Browne-Wilkinson below:

In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an 'unless' order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find

- A excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.
- B

[7] Thus, in this case I must examine the reason given by the plaintiff for breaching the unless order.

C REASON FOR THE BREACH

- D [8] The reason given was because the plaintiff's handwriting expert, Mr Harcharan Singh suffered a fall and tore the ligaments of his right knee. This unfortunate accident happened on 1 June 2010 and he was given medical leave for 14 days and on his follow up with his doctor on 3 June 2010, Mr Harcharan Singh was advised against travel. He said he was unable to complete his report because his 'computer, document examination equipment, report, ready-developed photographs and supporting material were all in the office'.
- E Thus he was only able to complete the supplementary report and sent it to the plaintiff's advocates on 22 June 2010 which was received by them on 23 June 2010. The medical leave certificate and referral letter from Pantai Hospital Kuala Lumpur of Mr Harcharan Singh were exhibited to his affidavit filed in opposition to the defendants' application for striking out.

- F [9] Viewed in isolation, the unfortunate incapacitation of Mr Harcharan Singh is of course a good justification for the non-compliance of the unless order but Mr Wilian Yeo for the defendants said, it should not be so. This is because the court record shows that the plaintiff has been given more than ample time to come out with the report and that I had to make the said order to rein in (my words, not his) the plaintiff's unduly laconious attitude (my words again) regarding the filing and serving of this report. Mr Wong Ho Leng's reply for his client is to state that no affidavit was filed by the plaintiff to show this delay. This, I agree, with Mr Wilian Yeo, is not necessary because the notes of proceedings for this case clearly bore the point made by Mr Wilian Yeo well.
- G
- H

- I [10] The notes of proceedings indeed show that the plaintiff requested for the original copies of the first defendant's memorandum of association and articles of association as well as the form on the transfer of securities and a circular of board of directors, all containing the alleged signature of the plaintiff and I fixed the examination of the same on *15 January 2010*. This was after PW2 had given evidence. I then fixed 5 February 2010 to mention the case to monitor the progress of the document examination. On *5 February 2010* I was

informed that the examination was done and that parties would be exchanging the reports. I ordered then that the reports be filed and served two weeks before the continuation of trial which I fixed on 1–2 April 2010. On 2 April 2010, the trial was further adjourned on application of the plaintiff's counsel so as to accommodate the plaintiff's expert witness and the defendants' expert witness who is from Australia to be present at the trial. I then fixed the case for continuation of trial on 19 May 2010 but on that date I was informed that the plaintiff's expert report was still not filed and served despite the earlier order made on 5 February 2010. Therefore, as I have mentioned earlier in this judgment, on 19 May 2010 I was forced to resort to making the unless order as I believed I have given much latitude to the plaintiff to prepare his supplementary expert report and more importantly because the original documents sought to be examined by Mr Harcharan Singh form the bedrock of the plaintiff's action in this case.

[11] The Court of Appeal has held in *Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram* [1998] 4 MLJ 297 that:

Ideally, all prescribed time limits falling under statute or made by court orders should be complied with and not to be ignored (see *Samuels v Linzi Dresses Ltd* [1981] 1 QB 115 at p 126).

[12] When one goes through the history of the proceedings above, it is obvious that the sudden illness of Mr Harcharan Singh is not justifiable excuse for non-compliance of the unless order because that report should have been prepared two weeks before 2 April 2010 bearing in mind that the examination of the documents in court was on 15 January 2010. Unfortunate though the fall of Mr Harcharan Singh was and much as I loathe the implication that the court is not sympathetic to his condition and heartless, nevertheless I have to be fair to the defendants and honour the twin pillars of judicial process mentioned by Sharma J in *Government of Malaysia v Dato' Chong Kok Lim* [1973] 2 MLJ 74 which are 'certainty' and 'finality'. What I am going to say next is not meant to trivialise the pain Mr Harcharan Singh had endured after his fall but given the time lapse between the examination of the original documents to the date of his fall, I would think that what is left for him to do with respect to the preparation of the supplementary report could be done in the comfort of his home during his recuperation. I am persuaded that the breach of the unless order by the plaintiff could have been avoided and in the circumstances opprobrious.

[13] Additionally, Mr Wilian Yeo had submitted on prejudice suffered by his client by reason of an order made by YA Datuk David Wong Dak Wah on 7 December 2005 which restrained the second and third defendants from conducting the affairs of the first defendant unless authorised by the first

A defendant's board of directors. I, however do not think this point makes much of a difference to what is already a strong case in favour of his clients because the exact prejudicial effect of the order was not highlighted in the affidavit evidence, which he should have done.

B [14] Mr Wong Ho Leng had in defence of his client also raised O 1A of the Rules of the High Court 1980 which exhorts the court or the judge to have regard to the justice of the case and not technical non-compliance of the Rules in making its/his decision. With respect, the invocation of this order is without basis because, the unless order was not made pursuant to the Rules of the High Court and the non-compliance is therefore not of any technical requirements of any of the provisions of the said Rules.

[15] Now, lest it be overlooked, I have also reminded myself at this juncture that the plaintiff had filed in an application to extend time to comply with the unless order. They are perfectly entitled to do so and Mr Wong Ho Leng is right of course that O 3 r 5 of the Rules of the High Court 1980 allows the plaintiff to file the application for extension of time even after the lapse of the time prescribed for the doing of the act. However, the delay in making the application in this case in that it was only filed on the date fixed for the hearing of the defendants' application for striking out, does not augur well for the plaintiff at all for he (or rather his counsel) knew of Mr Harcharan Singh's accident in early June. Yet only on 5 July 2010 was the application for extension filed, despite knowing earlier that the defendants' application for striking out dated 23 June 2010 was fixed for hearing on the same date ie 5 July 2010. This unexplained and unexcusable delay is a factor to be considered in considering whether to allow the plaintiff's application to extend the time as it shows how genuine was the plaintiff when he made the said application. Furthermore, late applications (without good and just cause) are frowned upon by the courts because they cause further delay in proceedings though I must admit it is not so in this case since neither Mr Wong Ho Leong nor Mr Wilian Yeo raised it to apply for an adjournment of the two applications herein. In my estimation, had the application been made soonest possible after Mr Harcharan's fall, the tide might have turned in the plaintiff's favour but after much consideration and not without some feelings of anxiety and trepidation (as the case is part heard), I am constrained to allow the defendants' application for striking out and dismiss the plaintiff's application for extension with RM3,000 cost to the defendants.

Application dismissed with costs.

I

Reported by Kohila Nesan